

IN SENATE OF THE UNITED STATES.

JUNE 8, 1836.

Read, and ordered to be printed.

Mr. SHEPLEY made the following

REPORT,

WITH ACT H. R. NO. 193.

The Committee of Claims, to whom was referred the bill from the House entitled "An act for the relief of the sureties of Nicholas Kern," report:

That the petitioners state that the accounts of the said Nicholas Kern were never finally settled until about the year one thousand eight hundred and twenty-six, when he was charged with an alleged balance of \$18,887 87, on account of *internal duties*, for uncollected distillers' bonds, and an alleged balance of \$5,306 93, on account of *direct taxes*.

The bill proposes to release the sureties of Kern from their liability on two bonds given to the United States, to secure the faithful performance, by said Kern, of the duties of his office as collector of direct taxes and internal duties for the eighth collection district of Pennsylvania.

The reasons assigned for such release are stated in the bill as follows: "The commissioner of the revenue and the agent of the Treasury having extended the time of payment without the consent of said sureties."

Suits are now pending against the legal representatives of the sureties, to recover the amount due to the United States on account of *internal duties*, stated by the petitioners to be \$18,887 87, and by the agent of the Treasury to be \$18,553 33. (See letter of S. Pleasonton, March 20, 1829, and letter of V. Maxcy, December 6, 1830, document C.) This suit was ordered on the 11th of August, 1826. On the 23d of the same August a Treasury warrant issued for the amount due on account of the *direct tax* of 1816, being for the sum of \$5,306 93, as before stated; and it appears that Kern was committed by virtue of this warrant, in the autumn of 1826, and afterwards discharged.

The correspondence from which the evidence of a new contract to extend the time of payment to the principal without the consent of the sureties is derived, is found in document A, from which the following extracts are taken:

September 24, 1818. *S. H. Smith writes to Mr. Kern:*

"It will be with deep regret that the situation of your accounts for *direct tax* shall compel me to make a representation to the Comptroller of the Treasury, that will lead to coercive steps against you."

October 8, 1818. *Mr. Kern to Mr. Smith.*

"It is with deep regret I must inform you that it is out of my power to make the deposit of the whole of the balance of *direct tax* immediately, as requested by you. * * * * * By the end of the present quarter I shall be enabled to accomplish a full settlement of the whole, or at least the greater part of the balance of *said tax*, and I beg that your honor's indulgence will be granted to me until that period."

October 16, 1818. *Mr. Smith to Mr. Kern.*

"Your favor of the 8th instant is received. My sense of duty does not enable me to extend the indulgence as to the final settlement of the *direct tax* desired by you. Anxious, however, to go as far as I can, I submit the following offer, to which I ask an immediate answer: That you agree to pay half of the balance on the 1st of November, and the remainder on the 1st of December. In this event my communication shall be withheld from the Comptroller."

October 24, 1818. *Mr. Kern to Mr. Smith.*

"It will be imposible for me to pay the balance as requested by you, namely, the one-half on the 1st day of November, and the other half on the 1st of December, as I have brought suits against my delinquent collectors. * * * * * If it is possible to indulge me, I will pledge myself to pay at least one-half of the balance on the 24th of November next, and the remainder on the 20th December."

October 30, 1818. *Mr. Smith to Mr. Kern.*

"I have this morning received your favor of the 24th instant, in which, in case you shall be indulged to those times, you pledge yourself to pay one-half of the balance of *direct tax* outstanding on the 24th of November, and the remainder on the 20th of December. Confiding in your honor, I accede to your proposition."

November 26, 1818. *Mr. Kern to Mr. Smith.*

"It is with deep regret that I am obliged to inform you that I have it not in my power to comply with my promise to you."

October 23, 1819. *Mr. Smith to Mr. Kern.*

"In regard to the *direct tax*, considering the long time since it should have been paid, no further indulgence whatever should be given, and can-

dor requires me to advise you, unless the whole outstanding amount be paid before the first of December, as you are personally responsible for it, I shall consider myself obliged, before I retire from office, which will be about that time, to lay the case before the Comptroller."

November 1, 1819. Mr. Kern to Mr. Smith.

"I have received your favor of the 23d October, wherein you request to have the *direct tax* deposited by the 1st of December next. Although I am fully sensible of the kind indulgence you have always shown to me, yet I cannot refrain from stating that it will be utterly out of my power to comply with your request, as it is out of the power of any man in this place to collect that sum of money in so short a time."

October 3, 1823. Mr. Pleasonton to Mr. Kern.

"I find also that there has remained in your hands, for a very considerable time, agreeably to the adjustment of your accounts by the Comptroller, a balance of cash received on account of internal duties, of \$2,067 61; and for the direct taxes you stand indebted to the United States in the sum of \$3,291 31, making together the sum of \$5,358 92; * * * and you have been repeatedly written to on this subject. It becomes my duty now to inform you that, unless the most satisfactory assurances are immediately given by you that the whole or the greater part of this amount will be paid before the first day of December next, coercive measures will be resorted to for its recovery."

November 13, 1823. Mr. Pleasonton to Mr. Kern.

"I have received your letter of the 11th instant, requesting indulgence until February next, for the payment of the cash balance of \$5,358 92, due from you on account of *internal duties* and *direct taxes*, and have the pleasure to inform you that it will be granted, in full confidence of the assurances you give that the payment will at that time be made."

November 7, 1825. Mr. Pleasonton to Mr. Kern.

"You have been repeatedly written to respecting the large amount of bonds outstanding in your district, and the payment of the cash balance against you, both for *internal duties* and *direct taxes*. So far back as November, 1823, in a letter received from you, you gave me positive assurances that, in a few months from then, the entire cash balance against you would be discharged, and every exertion would be made by you to have the bonds accounted for, notwithstanding which, your accounts still remain in the same situation they were at that time, and, indeed, ever since the year 1819.

"I now inform you, as every indulgence consistent with my official duty has been extended to you, without having the effect of bringing the concerns of your district any nearer to a close than they were six years ago, that, unless the cash balances against you are paid by the 31st December next, and a satisfactory statement of the situation of the outstanding bonds, which statement you have been repeatedly requested to furnish, is transmitted to me, I shall, immediately thereafter, take such measures as the case calls for."

It will be noticed that, whatever had been said in relation to delay of payment before October, 1823, related exclusively to the balance due for *direct taxes*. It is on the 23d of October, and on the 13th of November, 1823, that a cash balance due on account of *internal duties* is alluded to.

But it appears that Mr. Kern made a payment of a sum of money on the 31st of December, 1818, of \$2,077, as stated by Mr. Kern, but of \$2,015 62, as stated by the Comptroller; and this sum had been regarded as a payment made on account of the *direct tax* at the Department.

Mr. Kern, in his letter of the 18th of December, 1822, states this to be an error, and that it should have been deposited on account of *internal duties*.

That error was finally corrected at the Department, as appears by the letter of the Comptroller to Mr. Kern, under date of December 21, 1825, [document J,] in which the Comptroller says, "Your accounts, as collector of the *direct tax* of 1816, from the 1st of October, 1820, to the 31st of March, 1825, have been adjusted at the Treasury, and a balance of \$5,306 93 stated to be due from you to the United States. The balance which you stated to be due, is \$3,115 60. Add differences last Treasury settlement, \$175 71. This amount, being so much deposited to the account of the Treasurer on the 31st of December, 1818, with commissions thereon, and placed to your credit in the statement of your accounts of *direct tax*, but since transferred to your credit of *internal duties* at your request, and on your stating that the same was received on the latter account, and erroneously deposited by you as the proceeds of *direct tax*, \$2,015 62. * * * You are requested to deposite the balance, \$5,306 93, in bank, to the credit of the Treasurer, and to forward the cashier's check therefor."

If this corrected statement of the accounts is to be regarded, then the correspondence respecting the delay of payment relates wholly to the balance of *direct tax*, although, while the error remained without correction, the correspondence speaks of \$2,067 61 being on account of *internal duties*. But if we take the correspondence in its broadest terms, it relates only to the *direct tax*, and to a definite cash balance of \$2,067 61 due for *internal duties*.

There does not therefore appear to have been any agreement for delay of payment, for the whole amount of *internal duties*, beyond the cash balance before stated.

Indeed, there could not have been any such agreement with regard to the principal part of the *internal duties*, because Mr. Kern represented the bonds taken by him to secure such duties to have been outstanding and uncollected, and made his returns of them as outstanding, until he was finally removed from office, 6th of April, 1826.

April 26, 1820. Mr. Pleasonton writes to Mr. Kern :

"I perceive, on looking over your list of bonds, No. 12, for the first quarter of 1820, that they have been very inconsiderably reduced since the 31st December, 1817. Be pleased to advise me without delay of the precise situation of these bonds, and the time when they will probably be paid."

May 13, 1820. Mr. Kern to Mr. Pleasonton.

"In compliance with your request, I inform you that, on nearly all the bonds not collected, there are judgments, and on some executions are issued."

Mr. Kern appears to have continued to make returns of outstanding and uncollected bonds, until near the time of his removal from office; when James M. Long was appointed, and having called for and received the books and papers, he writes to the agent, Mr. Pleasonton, under date of August 3, 1826; from which letter the following is an extract:

"On the 21st of July last, I received various books and papers, &c. of Nicholas Kern, Esq. I have since carefully examined the books in my possession received of Mr. Kern, but there is no list of bonds stated in said books later than the 31st March, 1821, at which time there is a list of one hundred and fifty-one bonds entered against different persons, amounting to \$21,069 60. Nearly one-half thereof are stated (under the head 'remarks') in suit; and on said leaf is wrote the following words, namely: 'The list of bonds has, ever since the date of the above account, been made out from the above, except the last account which was made, and are all incorrect, and must not be respected. Nicholas Kern, collector.'

"There appears to be several leaves cut out of the book immediately after this account of bonds.

"He has stated, in a quarterly account current, dated 31st March, 1826, in which he states a balance due the United States of \$18,887 87 in uncollected bonds. And there is entered in his books a monthly return of direct tax of 1816, dated 31st December, 1826, stated a balance due the United States of \$5,306 93 in the hands of deputy collectors. (Mr. Kern must certainly be mistaken in the date of the above entry.) Mr. Kern has acknowledged to me that all the money due the United States has been collected by him and his deputies, except one bond of \$457 92. *** As Mr. Kern acknowledges that he has received the money, and there is no bonds in his possession, (but the one above mentioned,) I thought it necessary to forward an account."

In a letter from the agent to S. D. Ingham, Esq., under date of 14th September, 1826, he says, "You will perceive that the principal part of the sum due is stated to be in uncollected bonds. Now, when Mr. Long was appointed to succeed Mr. Kern, and demanded these bonds for collection, it appeared that the latter had none to deliver, they having been all collected by him, and delivered up to the individuals, so that, instead of being indebted for bonds outstanding, Mr. Kern is indebted for cash to that amount. Had he been in possession of the bonds, and delivered them over to Mr. Long, he would have received a credit for the amount."

It is to recover this sum of \$18,887 87, stated by Mr. Kern never to have been collected, but to have existed "in uncollected bonds," that the present suits are pending; and there does not appear to have been any arrangement whatever for delay in regard to the outstanding or uncollected bonds; on the contrary, the calls are urgent and repeated to collect them and pay over the amount. Kern could not ask delay of payment for these bonds, for he never admitted his liability until after remo-

val. Nor could the officers of the Treasury have thought of giving delay, because they supposed the bonds to be in his hands, uncollected. The reasons for discharging the sureties which are stated in the bill, do not appear to exist, at least so far as relates to the sum of \$18,887 87.

It may not be desirable to examine carefully, whether the sureties are discharged at law from the sum of \$5,306 93.

But if it were necessary to inquire upon that point, the committee would incline to consider the law as settled in the cases of the United States vs. Nicholl, and McLemore vs. Powell. 12 Wheaton's Reps., pp. 505 and 554.

In the first of these cases the court observes, "The letter speaks of an intention formed of giving time upon the mortgage upon specified conditions and contingencies, but none of those conditions or contingencies are shown to have been complied with, or to have happened. The letter contains no contract, and gives no time *per se* upon any consideration binding upon the Government."

In the latter case, the court says, "The case, then, resolves itself into this question: whether a mere agreement with the drawer for delay, without any consideration for it, and without any communication with, or assent of, the endorser, is a discharge of the latter, after he has been fixed in his responsibility by the refusal of the drawer, and due notice to himself. *And we are all of opinion that it does not.* We admit the doctrine that, although the endorser has received due notice of the dishonor of the bill, yet, if the holder afterwards enters into any new agreement for delay, in any manner changing the nature of the original contract, or affecting the rights of the endorser, or to the prejudice of the latter, it will discharge. *But in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it.*"

Whether there is such an agreement contained in the correspondence as would be binding upon the United States, and prevent a suit by them until the expiration of the time stated in the letters, would seem to be a proper question for a judicial tribunal to decide.

But as the sum now sought to be recovered by the suits is free from such a question, there does not appear to be any sufficient ground for the interference of Congress, on account of the reasons stated in the bill.

There are, however, considerations of an equitable character, which will be very briefly stated. A large amount of bonds, taken for internal duties, had been taken as early as 1817, amounting to about \$21,000; and these bonds remained with the collector without collection, as he stated, and without any more definite account of them, until 1826, when there remained still due nearly \$19,000. This very long delay, without any satisfactory reasons or explanations, has operated severely upon the sureties, and most of them have since deceased; and their estates have been settled, without a knowledge of these liabilities.

The committee regard this as a case of great negligence on the part of the officers of the Government, by which negligence the sureties have been much injured; and if this is regarded as sufficient cause for a discharge of the sureties, then the bill should pass, otherwise, not.

The first part of the paper is devoted to a general
discussion of the subject. It is then divided into
three sections. The first section is devoted to a
discussion of the general principles of the subject.
The second section is devoted to a discussion of the
particular principles of the subject. The third section
is devoted to a discussion of the application of the
principles to the subject. The paper is then
concluded with a summary of the results.

